No. 80-607

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MARK E. SAGER,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS,
WESTERN DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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OPINION BELOW

The opinion of the Missouri Court of Appeals, Western District, affirming the Petitioner's conviction for manslaughter is reported at *State* v. *Sager,* 600 S.W.2d 541 (Mo.App., W.D. 1980).

JURISDICTIONAL STATEMENT

This Court has jurisdiction of this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257(c), which provides that this Court may review the final judgment of the

highest court of a state by writ of certiorari where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the failure to suppress evidence of an oral statement given by the Petitioner on October 1, 1977 constituted a violation of the Petitioner's right against self-incrimination pursuant to *Miranda* v. *Arizona,* and whether the use by the State of oral statements obtained on October 2, 1977 and October 5, 1977 for purposes of cross-examination and rebuttal was a permissible means of attacking the credibility of the Petitioner where the statements had been earlier declared to be inadmissible in the State's case in chief.

2. Whether the Petitioner's conviction for manslaughter was a "compromise verdict" or was justified by the evidence at trial in this case.

3. Whether the Petitioner was "hampered in his preparations for his defense" by the acts of the prosecutor.

STATEMENT OF FACTS

The respondent adopts, as its Statement of Facts, the statement of the facts which appears in the opinion issued in this case by the Missouri Court of Appeals, Western District. See *State* v. *Sager,* 600 S.W.2d 591, 543-556 (Mo. App., W.D. 1980). The facts relevant to the issues advanced by the Petitioner are further outlined, in considerable detail and with transcript reference, under the section styled "Reasons for Denying the Writ", *infra.* No purpose would be served by duplicating that recitation of the facts in this section of the respondent's response.

ARGUMENT

I.

The trial court did not err (1) by overruling the Petitioner's motion to suppress evidence of an oral statement given on October 1, 1977, because the statement was obtained pursuant to the requirements of Miranda **v. Arizona, or (2) permitting the State to cross-examine the Petitioner about oral statements given on October 2, 1977, and October 5, 1977, and also permitting the use of those statements for rebuttal purposes because those statements were sufficiently trustworthy to be used for impeachment purposes to attack the credibility of the Petitioner's trial testimony.**

The Petitioner's argument on this issue challenges the use and admission of certain statements given by the appellant on three dates following his arrest, October 1, October 2 and October 5, 1977. The trial court ruled that the statement given on October 1st would be admissible in the State's case in chief (Tr. 187). The statement of October 5, 1977, was determined by the court to have been obtained contrary to the Petitioner's rights and would not be admissible as a part of the State's case in chief (Tr. 187). Later, the court ruled that the statement of October 2, would not be admissible as a part of the State's case in chief (Tr. 1019).

Each of these conclusions of the trial court was reviewed at length and approved by the Missouri Court of Appeals, Western District. *State* v. *Sager,* 600 S.W.2d 541, 553[1], 556-557[3][4][5][6] (Mo.App., W.D. 1980). The appellate court held, in summary, that the statement of October 1, 1977 was admissible in the State's case in chief due to the Petitioner's failure to demonstrate the involuntariness of the statement under *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The admis-

sion of the statements of October 2 and October 5, 1977 for purposes of cross-examination and rebuttal was held to be proper impeachment upon prior inconsistent statements as approved by this Court in *Harris* v. *New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). *State* v. *Sager, supra,* 600 S.W.2d at 560-561[7].

Upon this application for writ of certiorari, the Petitioner has presented no new argument or citation of authority. Nor has he indicated what were the errors committed by the Missouri Court of Appeals in affirming his conviction. The sole reference to that opinion in the Petition of Certiorari does not advance the Petitioner's argument, since it is completely false. It is alleged that, "The Missouri Court of Appeals totally ignored the holdings of the above-quoted [*Miranda* v. *Arizona; Harris* v. *New York*] U.S. Supreme Court cases." (Petition for Cert., p. 11). As noted above, it is precisely these two cases, *Miranda* and *Harris,* upon which principal reliance is placed by the Missouri Court of Appeals in support of its ruling. Far from 'totally ignoring' these controlling authorities, the opinion of the Missouri Court of Appeals cited *Miranda* sixteen times and *Harris* six times.

It is the Petitioner, not the Court of Appeals, who has ignored the *holding* of the *Harris* case. On page 10 of the Petition, a lengthy quotation from the *Harris* case is offered as the opinion of "the Court". (Petition for Writ of Cert., p. 9). However, the excerpted passage is not to be found in the opinion of this Court entered in that case, 401 U.S. 222-226. It is, in fact, an excerpt from the dissenting opinion of Justice Brennan, 401 U.S. at 228, 91 S.Ct. at 647.

The Petitioner first argues that the statement of October 1st was obtained in violation of the Petitioner's rights under *Miranda* v. *Arizona,* 386 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Petitioner further argues that the

two statements of October 2nd and 5th were correctly excluded by the court from the State's case in chief, but that the court erred by permitting the use of those statements by the State to impeach the Petitioner's testimony. He further claims that the use of these statements by rebuttal witnesses, attempting to discredit the truthworthiness of the Petitioner's testimony, was improperly permitted by the trial court. The first issue, therefore, concerns the propriety of the October 1st statement as evidence in the State's case in chief. The second issue involves the use of statements excluded from the State's case in chief but admitted for impeachment purposes.

It is beyond dispute that "the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966). After the proper warnings have been given, if the interrogation continues without the presence of an attorney and a statement is taken, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda* v. *Arizona, supra,* 86 S.Ct. at 1628.

Recently, in *North Carolina* v. *Butler,* ____ U.S. ____, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979), this Court explained its holding in *Miranda* v. *Arizona. Butler* involved a defendant who was arrested in New York on the basis of a North Carolina fugitive warrant. Following his arrest by the F.B.I., the defendant was fully advised of the rights delineated in the *Miranda* case. The defendant was taken to a nearby F.B.I. office where the agents determined that he had an 11th-grade education and was literate. He verbally stated that he understood his rights but he refused

to sign a written waiver. He replied, "I will talk to you but I am not signing any form." Following this, the defendant made inculpatory statements. At no time did the defendant request counsel or attempt to terminate the agents' questioning. *North Carolina* v. *Butler, id.*, 99 S.Ct. at 1756. The defendant, then, expressly waived his right to silence but did not expressly waive his right to counsel. In holding that an expressed waiver was not necessary, this Court stated that "[t]he question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." *North Carolina* v. *Butler, id.*, 99 S.Ct. at 1757. This Court went on to hold that, "in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *North Carolina* v. *Butler, id.*, 99 S.Ct. at 1757. This Court adopted the view which previously 10 of the 11 United States Courts of Appeal and the courts of at least 17 states had adopted, namely, that an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel guaranteed by the *Miranda* case. *North Carolina* v. *Butler, id.*, 99 S.Ct. at 1759.

In the instant case, Clarence Luther, one of the arresting officers, testified that he arrested the Petitioner at his residence on October 1, 1977 (Tr. 981). Luther advised the Petitioner of his rights under the *Miranda* decision (Tr. 983). The Petitioner verbally stated that he understood his rights but that he refused to sign a waiver, since his mother had instructed him not to sign anything (Tr. 983). In order to positively ascertain that the Petitioner understood his rights, Luther asked him if he would be willing to talk to the police without an attorney present (Tr. 983). The Petitioner indicated that he would be willing to talk but that he would not admit to anything (Tr. 983). Luther reminded the Petitioner of the seriousness of the crime

and of the fact that he was a suspect (Tr. 984). Luther learned from the Petitioner that the Petitioner was a senior in high school and again reminded the Petitioner that he was a prime suspect in the murder investigation (Tr. 984). Luther indicated that the Petitioner was very concerned about learning what physical evidence the police had against him (Tr. 984). Luther and the Petitioner discussed the physical evidence, particularly the bite mark on the victim's body, for some time (Tr. 985). After this discussion, Luther stated that the Petitioner made the statement, "so you can prove that I bit her on the breast, but what does that prove?" (Tr. 985). After Luther indicated that he had never told the Petitioner the location of the bite mark and that such a statement indicated that he was present at the murder scene (Tr. 986), the Petitioner began to relate his activities on the day of the murder, September 2, 1977 (Tr. 986).

The Petitioner gave a lengthy statement to the police (Tr. 986-989), after which Luther asked him, "Mark, what's keeping you from going on and telling us all about how you killed Julie Wittmeyer and how she was killed?" (Tr. 989). Luther testified that, after a long pause, the Petitioner held his head down and then stated, "If my daddy will let me tell you, I will tell you everything how she was killed and everything" (Tr. 989-990). Luther testified that the interview terminated at that point (Tr. 990). Although the Petitioner's statement to Officer Luther was quite extensive, the Petitioner, in his brief, objected only to one portion of that statement:

> "Q. Mark was asked what it would take to get him to tell us how his teeth impressions got on Julie's breast and how Julie was killed. Is that correct?
>
> A. That's correct.
>
> Q. And Mark replied: 'If my dad tells me to

tell you I will tell you everything and how Julie was killed.'

A. That's what he stated." (Tr. 1009).

The record indicates that Officer Luther went to great lengths to inform the Petitioner of his rights and to determine absolutely that the Petitioner had voluntarily and knowingly waived those rights (Tr. 983-984). The Petitioner stated that he understood his rights and that he would be willing to talk to Officer Luther (Tr. 983). The Petitioner admitted that he never asked for an attorney during this time (Tr. 1837).

Although the law does not require the police to obtain an express waiver of rights from the Petitioner, *North Carolina* v. *Butler, supra,* 99 S.Ct. 1757, the police did obtain an express waiver from the Petitioner in this case. Clearly, the circumstances surrounding the interrogation of the Petitioner on October 1, 1977, revealed that the Petitioner understood and knew what rights were his under the law and that he knowingly and voluntarily waived the rights delineated in the *Miranda* case. *North Carolina* v. *Butler,* id., 99 S.Ct. at 1757. No allegation is made that the Petitioner had retained counsel at this time nor does the record contain even the slightest hint that the Petitioner's rights were violated in any way whatsoever. As a result, the trial court was correct in permitting the statement given by the Petitioner to the police on October 1, 1977, to be used in the State's case in chief. The Missouri Court of Appeals correctly ruled that the requirements of the *Miranda* case with regard to this evidence were completely satisfied. *State* v. *Sager, supra,* 600 S.W.2d at 556.

The Petitioner also argues that the oral statements made by him to the police on October 2nd and October 5th of 1977 could not be properly used even for impeach-

ment purposes. As earlier noted, the trial court ruled that the statements received on October 2nd and October 5th were not admissible as a part of the State's case in chief (Tr. 187, 1020). Although the reason for the trial court's exclusion of those statements is not clearly stated in the record, the appellate court has concluded that these statements were properly excluded as evidence in the State's case in chief, because the State "had failed to carry its burden showing the state was not aware of the entry of defense counsel at the hearing upon the motion to suppress." *State* v. *Sager, supra,* 600 S.W.2d at 561. Although the State disputed the propriety of this ruling of the trial court, and still contends that the principles of the *Miranda* case would not have been contravened by the admission of this evidence as a part of the State's case in chief, the following discussion will assume, for purposes of argument, that the trial and appellate courts were correct in their conclusion that this evidence was properly excluded.

The rule is clear that a statement which is inadmissible against a defendant in the prosecution's case in chief because of a lack of the procedural safeguards required by *Miranda* v. *Arizona, supra,* 86 S.Ct. at 1602, may, if it is sufficiently trustworthy, be used for impeachment purposes to attack the credibility of a defendant's trial testimony. *Harris* v. *New York,* 401 U.S. 222, 91 S.Ct. 643, 644, 28 L.Ed.2d 1 (1971). The exclusionary rule is applied only to the case in chief of the prosecution and not as it regards any use for impeachment purposes. The reasons for this rule were announced in *Harris*:

> "The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of a speculative possibility

that impermissible police conduct will be encouraged thereby." *Harris* v. *New York, id.,* 91 S.Ct. at 645.

Statements obtained in violation of *Miranda* may be utilized nevertheless to test the truthfulness of a defendant's testimony. "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Harris* v. *New York, id.,* 91 S.Ct. at 646. Statements obtained from a defendant in violation of his *Miranda* rights may be offered for impeachment purposes if those statements were given voluntarily. *United States* v. *McIntyre,* 467 F.2d 274, 277 (8th Cir. 1972), *cert. den.,* 410 U.S. 911, 93 S.Ct. 972, 35 L.Ed.2d 274 (1973). On the other hand, however, any use of a defendant's involuntary statement at a criminal trial is a denial of due process of law. *Mincey* v. *Arizona,* 437 U.S. 385, 398, 98 S.Ct. 2408, 2416, 57 L.Ed.2d 290 (1978). In *Harris* v. *New York, supra,* 91 S.Ct. at 645, the court noted that the statements made to the police by the defendant were not coerced but were voluntarily made. Where the defendant takes the stand and denies his guilt, the state is entitled to question him about his prior statements for the purpose of impeaching his credibility as a witness. *United States* v. *Rooks,* 577 F.2d 33, 37-38 (8th Cir. 1978). The correctness and applicability of the above-stated principles of federal constitutional law were recognized by the Missouri Court of Appeals in its opinion in this case. *State* v. *Sager, supra,* 600 S.W.2d at 560-561.

Assuming, *arguendo,* that the statements obtained from the Petitioner were received contrary to his rights under *Miranda,* clearly, they could be offered for purposes of impeachment. Terry Deister testified that on October 2, 1977, he contacted Mark Sager for the purpose of transporting him to the jail at Lexington, Missouri (Tr. 92).

Officer Deister rode in the back seat of the car while Corporal Dayringer drove the automobile (Tr. 93). Prior to entering the vehicle, Officer Deister informed the Petitioner of his constitutional rights by reading "the standard Miranda Warning Card" (Tr. 93). The Petitioner indicated that he understood his constitutional rights (Tr. 94). The Petitioner indicated a desire to talk about his case, and Officer Deister explained that he was taking the Petitioner to Lexington for security purposes (Tr. 94). The Petitioner began to ask Deister questions about his case (Tr. 105-106). Additionally, the Petitioner indicated a desire to finish the statement that he had started the previous day (Tr. 106). The Petitioner's statement was recounted by Deister when he was called as a rebuttal witness by the State (Tr. 1926-1930).

The record discloses that, without a doubt, the Petitioner made his statement to Officer Deister on October 2, 1977, voluntarily. He had been informed of his rights, had expressly acknowledged that he understood his rights, and subsequently began to interrogate Officer Deister concerning his case.

Even if this statement was inadmissible as a part of the State's case in chief, which is disputable, certainly its use for impeachment purposes was proper. A defendant is privileged to testify in his own defense, but that privilege is not construed by this Court to include the right to commit perjury. *Harris* v. *New York, supra,* 91 S.Ct. at 645. In this case, the prosecution did no more than utilize the traditional truth-testing devices of the adversary process. *Harris* v. *New York, supra,* 91 S.Ct. at 645-646. The trial court properly realized that the shield provided by *Miranda* should not be perverted into a license to use perjury by way of a defense, freeing the Petitioner from the risk of confrontation with prior inconsistent statements. *Harris* v. *New York, id.,* 91 S.Ct. at 646. As a result, no

error was committed in r ard to the statement of October 2, 1977.

On October 5, 1977, Clarence Luther and Fred Mills, of the Kansas City, Missouri Police Department and of the Missouri Highway Patrol, respectively, interviewed the Petitioner in the Lexington, Missouri Jail (Tr. 122). The officers advised the Petitioner of his constitutional rights and presented him with a written waiver which he read and signed (Tr. 122). The Petitioner stated that he would talk to the officers concerning the homicide but that he would not admit anything (Tr. 122). Luther asked the appellant if his parents had retained an attorney for him and the Petitioner replied that they had retained an attorney named Brown, but that he was unsure whether or not his parents would keep this attorney (Tr. 122). Officer Luther then asked the Petitioner if he would be willing to discuss his case with them without the presence of an attorney (Tr. 123). The Petitioner agreed and subsequently discussed his case with them for approximately one and one-half hours (Tr. 123). Officer Luther was called as a rebuttal witness by the State and recounted the statement made by the Petitioner on October 5, 1977 (Tr. 1893). Luther and the Petitioner had discussed the bite mark on the victim and then had discussed the knife which was used to murder her (Tr. 1893). Luther explained to the Petitioner that the police had searched his house looking for the knife (Tr. 1894). At that point, Luther testified, the Petitioner's whole personality changed and he started laughing, he hit his hand on the desk, slapped his legs and said, "You didn't find it, did you?" (Tr. 1894). Luther responded, " 'Mark, how can you be so sure we didn't find the knife?' He says, 'I know because if you tell me you found the knife used to kill her that you're lying to me because I know you didn't find the knife.' " (Tr. 1895). Luther testified that the Petitioner persisted

in telling him that he was wasting his time searching for the knife because he would not find it (Tr. 1895).

During the interview, Luther discussed with the Petitioner the Petitioner's relationship with his mother (Tr. 1896). Luther testified that the Petitioner had admitted that on one occasion he had choked his mother (Tr. 1896). The Petitioner stated that he knew choking his mother was wrong but that he was capable of putting that incident out of his mind as if it had never occurred (Tr. 1896).

The Petitioner took the stand and testified concerning his activities on the day of the murder, September 2, 1977 (Tr. 1828-1835). He indicated that his mother had driven him from school to the Riverside Drive-In, where he was employed (Tr. 1829). Further, the Petitioner denied telling the police on October 1, 1977 that he would tell them how Julie Wittmeyer was killed if his father would permit him (Tr. 1837). The Petitioner stated that he did not ask for an attorney because he "had not done anything" (Tr. 1837). The Petitioner was questioned at length concerning his knowledge of the location of the bite mark and of his consent to the taking of his teeth impressions (Tr. 1837-1838). Finally, the Petitioner unequivocally denied committing the murder (Tr. 1838).

The use by the State, during cross-examination and rebuttal, of certain inconsistent statements made by the Petitioner on October 2nd, and October 5th, 1977, was to attack the credibility of the Petitioner. The statement given by the Petitioner on October 5th was quite extensive but was introduced, in response to issues raised by the Petitioner during his direct examination. The Petitioner discussed the issue of the location of the bite mark on the victim (Tr. 1837), as well as the statement that he would relate to the police the circumstances of the murder (Tr. 1837). Moreover, the Petitioner emphatically denied that he had committed the murder (Tr. 1838).

Because the Petitioner took the stand and denied his guilt and because he raised the issues which the State sought to refute, his prior statements, even if not admissible as a part of the State's case in chief, were admissible for the purpose of impeaching his credibility as a witness. *United States* v. *Rooks, supra,* 577 F.2d at 37-38. The State was merely impeaching the credibility of the witness as it would be entitled to attack the credibility of any witness. *State* v. *Moore,* 546 S.W.2d 10, 13 (Mo.Ct.App. at St.L. 1977).

The Petitioner has apparently abandoned his earlier reliance on *State* v. *Johnson,* 524 S.W.2d 97 (Mo. banc 1975), which involved a discovery problem rather than a constitutional issue. Instead, sole reliance is placed upon *Miranda* v. *Arizona, supra,* the dissenting opinion of Justice Brennan in *Harris* v. *New York, supra,* and the opinion of the United States Court of Appeals for the Fifth Circuit in the case of *United States* v. *Havens,* 592 F.2d 848 (5th Cir. 1979). Of these, only the *Miranda* opinion is controlling on this Court, and, as demonstrated in the opinion of the Missouri Court of Appeals, the requirements of *Miranda* were complied with fully. *State* v. *Sager, supra,* 600 S.W.2d at 560-561[7].

The Petitioner's reliance upon the Fifth Circuit's opinion in *United States* v. *Havens, supra,* 592 F.2d 848, is completely misplaced, since the judgment of the Fifth Circuit in that case was specifically reversed by opinion of this Court filed in *United States* v. *Havens,* ____ U.S. ____, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980). The reasons which led this Court to reverse in *Havens* dictate that the arguments of the Petitioner on this Petition be rejected.

The appellant's argument regarding the alleged error in admitting for purposes of cross-examination and rebuttal his statements of October 2, 1977 and October 5,

1977 depends completely on his claim that, "at no time during direct examination did the Petitioner refer to or deny any of the statements made on October 2, 1977 and October 5, 1977" (Pet. for cert., p. 10). The Petitioner contends that this fact, pursuant to the rationale announced in Justice Brennan's dissent in *Harris* and followed in the since-reversed opinion of the Fifth Circuit in *Havens,* operated to prohibit the introduction of the challenged inculpatory evidence on cross-examination or rebuttal.

This Court specifically addressed the question of whether or not impeachment evidence must be related to statements referred to on direct examination of the defendant in the *Havens* case:

> "[A] defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained that is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt." *United States* v. *Havens, supra,* 100 S.Ct. at 1917[3].

In *Havens,* as in the present case, previously inadmissible evidence was brought in both for purposes of cross-examination and for rebuttal. See also *United States* v. *Rada-Solano,* 625 F.2d 577, 579[1] (5th Cir. 1980).

The only true issue with respect to the use of the challenged evidence by the State is the question of whether the cross-examination attempted was "reasonably suggested by the defendant's direct examination", *United States* v. *Havens, supra,* 100 S.Ct. at 1917. The State of Missouri submits that those excerpts from the Petitioner's direct testimony which are reproduced in the opinion of the Court of Appeals (*State* v. *Sager, supra,* 600 S.W.2d at 558; Pet. for Cert., p. A-37) do in fact suggest, both

generally and specifically, that the Petitioner was testifying in a manner contrary to the evidence later presented by the police officers. As this Court has noted, it is essential to the proper functioning of our adversary legal system that when a defendant takes the stand on his own behalf, the government must be permitted to engage in "proper and effective cross-examination in an attempt to elicit the truth." *United States* v. *Havens, supra,* 100 S.Ct. at 1916[1,2]. The privilege against self-incrimination, protected by the Fifth Amendment and discussed in *Miranda, supra,* demands no more than this. *Brown* v. *United States,* 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958); *United States* v. *Havens, supra,* 100 S.Ct. at 1916.

As the repeated references to the opinion of this Court in *United States* v. *Havens, supra,* would indicate, there is no question raised by this Petitioner's Petition for Writ of Certiorari on the *Miranda* issue which is not fully answered by the opinion of this Court in *Havens.* The question of law having been fully considered and properly ruled by the Missouri Court of Appeals, no purpose would be served by a further review of this matter before the Supreme Court of the United States.

Under the circumstances of this case, the trial court did not commit error when it permitted the statement of October 1, 1977, to be admitted as a part of the State's case in chief. Nor did the Court err when it allowed the State to use the Petitioner's statements of October 2nd and October 5th, 1977, for impeachment purposes, because the statements were voluntarily given and because the State used the statements for rebuttal purposes only. This Court, therefore, should not afford the Petitioner relief on this point. The opinion of the Western District of the Missouri Court of Appeals affirming this conviction, *State* v. *Sager, supra,* was not erroneous for any reason.

II.

The jury verdict of guilty of manslaughter does not reflect any impermissible compromise but is fully supported by the evidence at trial sufficient to support a finding beyond a reasonable doubt that the appellant "caused the death of Julie Wittmeyer by stabbing and cutting her".

No citation of authority or invocation of constitutional principle attends the Petitioner's brief argument alleging that "the jury was misled and compromised their verdict (Pet. for Cert., p. 8). This issue was fully addressed by the opinion of the Missouri Court of Appeals, Western District, and the appellant has presented no argument demonstrating wherein that Court may have erred in its disposition of this issue. *State* v. *Sager, supra,* 600 S.W.2d at 575-576. As that Court noted, the Petitioner argues that the evidence "was so abundant that the jury could have found appellant guilty of capital murder", and it was thus a necessary conclusion from this premise that the lesser included offense, under the Missouri Statutory scheme, of manslaughter was also proved by said evidence. *State* v. *Sager,* 600 S.W.2d at 576[15]. As Instruction No. 8, the manslaughter instruction, submitted, there was sufficient evidence of record to warrant the finding that the Petitioner had caused the death of the victim by stabbing and cutting her. There is no element of manslaughter in Missouri which is not included within the greater offenses of homicide, evidence in support of which the Petitioner has admitted may be found of record. It is obvious that the jury may determine, and in this case has determined, that the elements of premeditation or intent which distinguish the higher degrees of homicide were not proved beyond a reasonable doubt. It is not inconsistent with this determination for the jury to conclude further that the question of whether the Petitioner had "caused the death of Julie Wittmeyer by stabbing and cutting her" was in fact proved

beyond a reasonable doubt (Instruction No. 8). The verdict actually returned by the jury in this case evidences their conclusion that these elements, which constitute manslaughter in Missouri, were proved by the State beyond a reasonable doubt.

III.

There is no evidence or argument presented to demonstrate that the Petitioner was "greatly hampered in his preparations" of the defense in this case by any act of the prosecutor.

As with the Petitioner's argument regarding the jury's verdict, there is no citation of authority or invocation of constitutional principle attached to the Petitioner's passing reference to his alleged difficulties in preparing a defense. Although no factual assertions are advanced, the petitioner has cited his Motion for Judgment of Acquittal and in the Alternative to Grant a New Trial as establishing his right to relief on this ground (Pet. for Cert., p. 11). However, that Motion filed at trial relates dozens of factual claims taking up fourteen pages of the Petitioner's brief before this Court (Pet. for Cert., A94-A107). This 'shotgun' approach to the presentation of claims for relief on appeal cannot possibly avail the Petitioner. His conviction was fully and carefully considered by the Missouri Court of Appeals, and the reasons for that Court's affirmance of conviction were fully and carefully recorded in an extraordinarily lengthy opinion. In light of the attention which has already been given the Petitioner's claims of error actually argued, there can be no question but that these unspecified general allegations of error are in fact insubstantial and need not be rebutted.

CONCLUSION

For the reasons outlined in the previous section of this response, the respondent respectfully urges this Court to deny the Petitioner's request for a Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District.

Respectfully submitted,

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